**AMPAC, a subsidiary of Kane-Miller Corp. *and* Beef, Boners and Sausage Makers Union, Local 100, United Food and Commercial Workers Union *and* Jan Piton *and* Jesus Gonzalez *and* Joseph Wargacki.** Cases 13-CA-19346, 13-CA-19724, 13-CA-19735, 13-CA-19641, 13-CA-19720, and 13-CA-19733

January 15, 1982

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 23, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the Administrative Law Judge and to adopt his recommended Order.[3]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, AMPAC, a subsidiary of Kane-Miller Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against our employees because they participate in a strike or engage in other protected concerted or union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under the National Labor Relations Act.

WE WILL offer to Stanley Karwaczka full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and WE WILL make him and employees Frank Sekula, Jesus Gonzales, Juan Perez, Warren Mills, Alfonso Pineda, Joseph Wargacki, and Stanislaw Krycinski whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharge, with interest.

AMPAC, A SUBSIDIARY OF KANE-MILLER CORP.

## DECISION

### STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard for 10 days in December 1980 and in February and March 1981 in Chicago, Illinois. The original complaint in Case 13-CA-19346 issued on January 16, 1980, and alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Board Act, as amended, by making proposals during bargaining negotiations with the Charging Party Union which were manifestly unacceptable to it. Those proposals were identified as follows: A 94-cent-per-hour wage reduction with no claim of financial inability to pay and the elimination of the cost-of-living allowance clause, the arbitration clause, the union-shop provision, and the union dues-checkoff clause from the contract of the parties which was to and did expire on December 20, 1979.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We adopt the Administrative Law Judge's conclusion that an altercation between Supervisor Mojica and Union Representative Ramirez did not constitute a violation of Sec. 8(a)(1) of the Act. However, we find it unnecessary to rely on his additional comment that, even if the incident had been found to be coercive, the time and events that have elapsed since the incident make it doubtful that a violation should be found and a remedy ordered.

[3] We find no merit in the General Counsel's or the Charging Party's exceptions to the failure of the Administrative Law Judge to provide certain additional remedies. While the General Counsel excepts to the failure to order "unconditional" reinstatement of certain discharged strikers who have, in fact, been reinstated, he does not contend that their reinstatement remains other than unconditional and complete. We also deny the Charging Party's request for attorneys' fees, bargaining expenses, and other costs incurred. See *Wellington Hall Nursing Home, Inc.*, 257 NLRB No. 106, fn. 2 (1981), and cases cited therein.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

The complaint also alleges that Respondent, through statements by General Superintendent Albert Mojica, committed three violations of Section 8(a)(1) of the Act. An amendment to this complaint alleges that a strike by Respondent's employees on and after January 18, 1980, was an unfair labor practice strike. A second amendment, dated May 29, 1980, alleges that Joseph P. Carey, an attorney and an officer of Kane-Miller, was an agent of Respondent.

A consolidated complaint in Cases 13-CA-19724, *et al.*, which issued on June 2, 1980, alleges that Respondent violated Section 8(a)(5) and (1) of the Act by distributing letters to employees during the course of negotiations, describing Respondent's negotiating positions, and by encouraging the Union to engage in a strike. Also alleged as violations of Section 8(a)(5) and (1) of the Act are Respondent's failure, after February 25, 1980, to deduct and tender dues to the Union and its refusal to permit the Union to designate its own stewards and business representatives to administer a collective-bargaining agreement allegedly reached by the parties on that date. The consolidated complaint also alleges that Respondent violated Section 8(a)(1) of the Act by virtue of a physical assault by Mojica on a union business representative in the presence of employees and Section 8(a)(3) and (1) of the Act by discharging a number of employees for engaging in the strike.

The two outstanding complaints were further consolidated by order dated June 2, 1980. A third amendment to Case 13-CA-19346 was issued on July 2, 1980, alleging that Respondent violated the Act by placing advertisements in local newspapers "seeking employees as permanent replacements for its striking employees who were engaged in an unfair labor practice strike" and by failing, since on or about December 20, 1979, to deduct and tender dues deductions to the Union pursuant to an orally extended collective-bargaining agreement. This amendment also alleges that Respondent violated the Act since December 20, 1979, by ceasing to recognize the Union as bargaining representative.[1]

Respondent dutifully and timely filed answers to all the above documents disputing the substantive allegations therein. After the hearing in this case the parties filed briefs which were received on or about May 4, 1981.

Upon the entire record herein, the testimony of the witnesses and my observation of their demeanor, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, an Illinois corporation with plants and offices in Chicago, Illinois, is engaged in the slaughtering of hogs. During a representative 1-year period, Respondent purchased and received materials, valued in excess of $50,000, at its Chicago facilities directly from points outside the State of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Charging Party Union (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Alleged Refusal To Bargain*

##### 1. The facts

###### a. *Introduction*

Respondent maintains two separate offices and plants in Chicago. One plant is located at 4277 South Racine Avenue; the other plant is located at 3946 South Normal Avenue. Respondent engages in the business of killing, cutting, and boning heavy hogs for sale to other firms which further process the meat. Although at one time nearly all of the commercial hog slaughtering in the United States was done in Chicago, Respondent is now the only entity in Chicago engaged in this business.

The purchase of livestock constitutes 58 percent of Respondent's cost of goods sold. The next largest factor is the cost of direct and indirect labor, which constitutes 5 percent of the total cost. Respondent has no control over the price paid for livestock, a commodity item; it does have some control over the cost of labor through the collective-bargaining process. When Respondent is able to achieve lower labor costs, there is more money available to compete in the marketplace for the purchase of livestock in a volume sufficient to operate its plants at optimum production levels. The meat industry, of which Respondent is a part, is a high volume industry with a typical return of profit on sales of about 1 to 2 percent.

In October 1978, and again a month or two later, officials of Respondent, including Lawrence Clark, Respondent's vice president, general manager, and chief executive officer, and Joseph P. Carey, Respondent's labor counsel, met with representatives of the Union, including Walter Piotrowski, the Union's secretary-treasurer. Clark told the union representatives that Respondent was losing money and asked the Union to agree to a waiver of the 34-cent wage increase due shortly thereafter to employees under the then-current collective-bargaining agreement and also two cost-of-living adjustments that were to become effective prior to the expiration of the agreement on December 19, 1979. Respondent produced financial statements in support of its request. Piotrowski denied the relief sought. Clark became quite upset and either he or Carey stated that Respondent would seek to obtain relief from what it believed were inordinately high wages in the next bargaining negotiations and that the Union could expect some "problems" when the current agreement expired.

###### b. *The negotiations*

Prior to the commencement of collective-bargaining negotiations for a new agreement in late October 1979, a

[1] On September 4, 1980, another name was added to the list of employees allegedly unlawfully discharged for participating in the strike.

"management committee" comprising of certain of Respondent's representatives met to consider and adopt bargaining objectives in the forthcoming negotiations with the Union. The objectives were: (1) the reduction of labor costs through a "roll-back" of 94 cents in the wage rates existent at the time of expiration of the collective-bargaining agreement between the parties,[2] or, in the alternative, no increase in the level of wages in effect at the expiration of the current agreement; (2) elimination of the cost-of-living provision in such agreement; (3) substitution of an employer-sponsored pension plan for the existing union-sponsored multiemployer plan;[3] (4) substitution of Respondent's contribution to a union-operated clinic for an increase in health and welfare benefits for employees;[4] (5) elimination of the requirement to submit unresolved grievances to arbitration;[5] and (6) achievement of a "two-tier labor structure."[6]

On October 24, 1979, collective-bargaining negotiations between the parties commenced. The first and subsequent meetings through December 17 were each attended by Clark and Carey for Respondent and by Walter Piotrowski for the Union. In addition, Respondent and the Union were each represented in bargaining by a number of other individuals.

At the first bargaining session between the parties on October 24, Clark presented Respondent's proposals which incorporated, *inter alia*, the bargaining objectives formulated by Respondent's "management committee." Piotrowski objected to the proposed deletion of the arbitration clause in the old contract. Carey explained that arbitration was not guaranteed by statute and that Respondent did not mean "to undermine anyone's rights." Respondent's officials explained their position by referring to what they believed was the Union's uncooperative stand in failing to offer Respondent relief on wages the year before and its insistence on taking every case to arbitration. Piotrowski also objected to the proposed deletion of the existing union-security clause and dues-checkoff clause. Carey stated that Respondent was offering voluntary union membership rather than mandatory union membership and that its position on dues checkoff was prompted by the Union's position in involving Respondent in arbitration cases concerning employees who had engaged in criminal conduct. Piotrowski was told "that the obvious criminal aspects of [such] cases should have dissuaded [the] Union from pursuing them [so as thereby to relieve Respondent] of incurred arbitration expenses." Piotrowski defended the Union's position but Carey stated that the Union's "insistence [in] taking every case to arbitration, regardless of its merits, was a wrong way to solve union/management problems."

Respondent presented its wage proposal with a statement that it was not claiming inability to pay more than was offered. The Union proposed a general wage increase and a continuation of a cost-of-living clause. Respondent rejected these proposals. The parties reached agreement on several proposals including some of the Union's proposals.

At the second bargaining session, held on November 7, the Union accepted some 13 management proposals but objected to Respondent's proposal calling for a 94-cent reduction in hourly wages and a 2-year wage freeze. Clark stated that there were "plenty of people willing to work at these rates." At one point, Clark stated that "it was his responsibility to run the [Respondent's] business and because somebody in the past agreed to a contract injurious to the [Respondent's] best interest, he, as the responsible manager, had to correct it." Clark advised Piotrowski that "because my predecessor gave in easily, I must state again, this will not be the case with us. I have given you the reasons for the [Respondent's] request[s] and all we get is *NO*."

At this meeting, Respondent proposed a new pension plan to replace the multiemployer plan presently in existence. Respondent's officials stated that a company plan would ensure stability in employment and they would offer to match or improve existing benefits. Piotrowski promised to study the new plan. Thereafter the following exchange ensued as shown in the minutes of the meeting:

> Piotrowski said that [Respondent] threatened them with a strike and all that he is hearing are only negatives . . . Carey interjected . . . that the [Respondent] did not threaten to strike, but [is] ready to take a strike . . . . Clark again repeated that the Union had better get used to hearing [a] tough stand by the [Respondent], jobs are not worth that much and he was not ready to pay for them . . . Piotrowski said that the [Respondent's] employees are good and efficient and deserve better than what the [Respondent] is offering . . . . Clark [replied sarcastically], "I saw some of those good employees

[2] At this point the amount of the last two cost-of-living adjustments had been determined to amount in the aggregate to 60 cents per hour. This amount, when added to the final wage increase of 34 cents per hour under the then-current agreement, made a total of 94 cents per hour by which Respondent's labor costs had increased since the time the Union's representatives had denied Respondent the relief requested in the meetings held in the latter part of 1978.

[3] In preparation for collective bargaining, Respondent consulted with an actuary and the individual responsible for the administration of the private pension plan of Kane-Miller Corp. Respondent decided that the pension contribution paid to the Union-sponsored plan would, if contributed to Respondent's own pension plan, result in a 70-percent increase in benefits for an employee retiring after 20 years' service.

[4] According to Respondent, only five to six employees utilized the clinic and other employees found it too crowded and too far distant from where they lived.

[5] Respondent's position was that it had been advised by the Union at some time during the contract term that every unresolved grievance would be taken to arbitration. Respondent believed that it was forced to defend personnel actions in cases it felt should not properly have been submitted to arbitration. The record shows that two arbitrations particularly rankled Respondent. The first involved the discharge of an employee in the summer of 1979. After Respondent submitted its evidence, the case was resolved by virtue of the resignation of the employee. The other case involved three individuals who were discharged in early 1979 after an undercover investigation which Respondent felt overwhelmingly showed their guilt on charges of fraud, theft, and other misconduct. The Union sought arbitration and a hearing opened in October 1979. Criminal charges were brought against two of the individuals for kidnapping a witness of Respondent who testified on its behalf, and they were arrested during the initial stage of the arbitration proceeding. Those charges are still pending as is the arbitration case.

[6] Clark testified that he learned that the Union had agreed to such a structure in the collective-bargaining agreements of other employers. Respondent sought the right to hire new employees at a wage rate almost $2 an hour less than that shown in the current collective-bargaining agreement between the parties.

> at [the] last arbitration hearing." [Following argument regarding the last arbitration case] Carey said that the Union's lawyer told him that he [had] suggested to . . . Piotrowski to take every grievance case to arbitration and that . . . Piotrowski is following this advice. . . . Piotrowski again responded [there were] grave legal consequences brought to bear upon the Union were they not to defend their members in all cases.

In the third bargaining session, held on November 8, Respondent proposed withdrawal from the Union's clinic and utilization of the monthly contribution for a new and improved employee health and welfare plan. Agreement was reached on guaranteed hours of work and seniority.

At the fourth bargaining session, held on November 14, a commissioner of the Federal Mediation and Conciliation Service appeared at the request of Respondent. Some agreements were reached but, at one point Piotrowski asked that Respondent reconsider its proposals concerning "wages, length of contract, union shop, check-off and arbitrations." He threatened that "if [Respondent] insists on all of these points, then [the Union] is ready for a strike. Thereafter, Piotrowski charged that Respondent's operation was comparable to that of other packers who paid relatively high wages. Clark replied, "You are wrong as hell, we are different, different as night and day. You better listen to what I am saying." Subsequently, Clark warned, "You still want to take, but this time we are not willing to give." After Piotrowski asked that Respondent "give us something," Clark pointed out that "I just [offered] you an increase in [health and welfare] and [p]ension." At the conclusion of the session, the commissioner summarized the positions of the parties and stated, "I trust, maybe, between now and next meeting . . . both parties could review their positions and come up with some movement, and not just going over the same thing."

On November 15, 1979, Respondent wrote the first of many letters to employees describing its negotiating positions and summarizing the negotiating sessions. There is no contention by the General Counsel that these letters were inaccurate or inherently unlawful. In the November 15 letter, for example, Respondent pointed out that it had offered a pension plan and a health plan to replace the existing union-sponsored plans which contained substantially greater benefits in its view than the Union's plans. Respondent also set forth its position on a rollback in wages, the elimination of a cost-of-living provision, union security, dues checkoff, and arbitration.

In the fifth and sixth bargaining sessions the parties reached some agreements. The parties discussed the pension issue. Although Respondent's plan offered $15 per year of credited service as opposed to the Union's plan of $9 per year of credited service, Respondent's plan offered no credit for past service. This meant that some employees with past service under the old plan would not have any past credits under Respondent's plan although they would retain credits under the Union's plan. Clark explained that Respondent's proposal to eliminate arbitration from the new agreement was based on the "bad experience" Respondent had had with arbitration in the then-current agreement. Clark also insisted that the wage rates paid by Respondent were much higher than were the rates for the same work performed under contracts maintained by the Union with other employers, particularly the so-called Association contract. Piotrowski disagreed and a long discussion followed concerning wage rates.

At one point in the sixth negotiating session Clark asked what it would take to reach an agreement. Piotrowski replied, "dues checkoff, union shop and arbitration." Piotrowski was asked whether the Union would consider concessions to Respondent in regard to wages if the latter would withdraw its proposals concerning dues checkoff, union shop, and arbitration. Piotrowski answered no. Piotrowski stated that there would be no meaningful negotiations unless there was agreement on "dues checkoff, union shop and arbitration." Respondent's officials replied that its proposal to eliminate these features was based on the Union's willingness to defend "gangsters and thieves" and asked that certain pending arbitration cases be dropped. Respondent had also objected to the Union's failure to accommodate Respondent when it wished to exchange an existing contractual holiday for one during the Pope's visit to Chicago. The Union apparently declined the offer.

At the seventh negotiating session on November 26, 1979, the Union withdrew a number of its own economic and noneconomic proposals and Respondent agreed to the Union's 21-cent-per-hour night-shift premium proposal. At the eighth session on November 29, Respondent proposed a wage progression scale for newly hired employees with a starting rate of $4.50 per hour. The Union countered with one starting at $5.10 per hour together with any further increases negotiated by the parties. At this point the major unresolved issues included pensions, wages, dues checkoff, union security, arbitration, and continuation of the union clinic.

At the ninth bargaining session held on December 10, Clark stated that if a settlement were not reached "there will be no extension of contract or retroactive pay." The parties continued discussing wage rates and exchanged views as to whether the wage rates paid by Respondent were too high in relation to other jobs covered by other union contracts. At the close of the meeting, Carey asked Piotrowski to give some thought prior to the next bargaining session to "Clark's [proposed] trade of his proposal of compulsory union membership, dues checkoff and arbitration for the wage rollback and the elimination of COLA."

The minutes of the 10th bargaining session, held on December 12, show that a representative of the Union's International, United Food & Commercial Workers International Union, AFL-CIO (hereafter called International Union), appeared for the first time in the negotiations between the parties. After discussion of the outstanding unresolved issues, which resulted in no significant changes in position, Clark restated Respondent's position that there would be no extension of the present agreement following its expiration on December 19 and no retroactive pay. Thereafter, he observed that an impasse had been reached, which left both parties free to

exercise their "lawful weapon options." Clark also stated that Respondent had the right to continue to operate and hire permanent replacements in the event of a strike.

At the 11th bargaining session, held on December 17, another representative of the International Union, Clayton Sayles, was present. At the outset, the parties reviewed the unresolved issues remaining in the negotiations. The Union conditionally withdrew a number of its proposals and Clark objected to the conditional nature of the withdrawal. Clark also stated that in "check[ing] with his legal counsel . . . Carey [he, Clark] was advised . . . that the [Respondent] can act unilaterally to implement its wage cut proposal, upon expiration of [the] contract. [Respondent's] position [is] that come Thursday morning, December 20, 1979, the wage roll-back will go into effect." Thereafter, Sayles inquired whether Respondent intended to implement unilaterally its other proposals on December 20, to which Clark replied, "No, just the 94 cent wage rollback." Sayles next inquired whether the Union could assume that Respondent would permit employees to continue to work following the expiration of the collective-bargaining agreement between the parties on December 19. Carey responded that, upon the expiration of the agreement, "conditions still exist." However, he advised there would be "no contract extension."

On December 18, Clark wrote Piotrowski a letter which was delivered to him at 9:40 a.m. In the letter, Clark stated:

> Because of the holiday season and contrary to our position at last night's bargaining session [Respondent] has changed its mind. The 94 cents/hour rollback will be postponed pending further negotiations.
>
> There will be no cut in pay [on December 20].

On December 18, Charles Hayes, a vice president of the International Union and regional director of its region 12,[7] the geographic jurisdiction of which includes the Union, contacted Carey to arrange a luncheon meeting with Clark. It was agreed that the three would meet on December 19 at Chez Paul Restaurant in Chicago.

On December 19, Clark, Carey, Hayes, and Sayles met for lunch at Chez Paul Restaurant. Hayes asked what could be done to reach a settlement in the current collective-bargaining negotiations between the parties. Clark explained he "could not live" with the high wage rates that Respondent had to pay its bargaining unit employees because the jobs involved were simply not worth such rates. He further explained that the Union had been successful in negotiating high wage rates with certain Chicago meat processors who were not in the slaughtering business, unlike Respondent. Clark stated that his predecessors with Respondent "gave away too much" when they agreed to the same high wage rates and that applicants for employment who had worked for nearby employers who slaughtered beef and lamb were paid substantially lower wage rates under contracts where Local 55, another local of the International, was the bargaining representative. Clark suggested that, if Hayes was really interested in reaching a settlement, he, in his position, could "switch the [Respondent] from Local 100 to Local 55 and he would be under less pressure to raise our rates in comparison to these [meat] processors in town." Hayes indicated he had no authority to do this, although the International Union's president did, and he suggested a meeting with Harry Poole, an executive vice president of the International Union.

After a short break, Hayes announced that he had arranged for a meeting to be held in Washington, D.C., on January 8, 1980, to permit discussion of Clark's proposal. Hayes also indicated that he had phoned Piotrowski to cancel the scheduled bargaining session following the luncheon meeting that day and "that the negotiations were going to be moved to Washington, D.C. to see if we could not reach an agreement there." Hayes added that Piotrowski would not be present at the Washington meeting.

In the course of conversation during the luncheon meeting, Hayes also said that he was aware that the agreement between Respondent and the Union was to expire at midnight and that Respondent had rescinded its position on the 94-cent-per-hour rollback. He inquired about Respondent's intention to pay the "holiday pay coming up." In response, Carey stated that all working conditions would remain unchanged following expiration of the agreement between the parties but, because the agreement was not extended, union security, dues checkoff, and arbitration of new grievances would not be continued. Hayes specifically asked if Respondent would continue to check off dues on January 1. Carey responded that checkoff cards become invalid at the expiration date of a contract and that, under Section 302 of the Taft-Hartley Act, such cards were not valid after such date.[8]

[7] In this capacity, Hayes is responsible for the administration of his region while directing a staff of six International representatives, including Sayles. Among Hayes' duties are the negotiation of collective-bargaining agreements and the "policing" of such agreements.

[8] The above is based primarily on the credible testimony of Clark whose recital of the events of the December 19 meeting was clear and detailed. Hayes' version is not inconsistent with Clark's except in one respect. Hayes testified that "Charlie [presumably Carey or Clark] told me that [Respondent] would be prepared to extend the contract based on my request, but not sign an extension, contingent upon a meeting being scheduled in Washington . . . ." Clark specifically denied that Respondent agreed to such an extension and I credit Clark. First of all, the alleged extension makes no sense in the context of the bargaining positions of the parties and what happened in subsequent meetings. Respondent had made clear in prior bargaining sessions that the current agreement would not be extended. Secondly, even Hayes' account implies that Respondent was only "prepared" to extend the contract depending on the outcome of the meeting in Washington. There was no *quid pro quo* for the extension and it is implausible that Respondent would agree to such an extension without some significant concession such as an agreement to forgo the strike which loomed on the horizon. Finally, I observed in the demeanor of Hayes and in the way he testified a less coherent witness and one whose recitation of facts and memory for details was not as clear as Clark's. It seems to me that Hayes may have confused Carey's remarks about what was to happen at the expiration of the current agreement. For example, on cross-examination, he admitted that Carey told him that it was the policy of his company not to make dues-checkoff deductions in the absence of an extension of the contract and that "they were not going to make the dues deductions . . . and that they would let things remain, the status would remain until after we had a meeting in Washington." In short, nothing in the record either directly or indirectly supports Hayes' testimony that Respondent agreed to an extension of the old agreement.

On January 8, 1980, Clark, Carey, Hayes, and Poole met at the headquarters of the International Union in Washington, D.C. Clark explained that Respondent's wage rates were too high and that Respondent "just couldn't live with those rates." Clark suggested that, as a means of resolving the "differences" that existed between Respondent and Local 100, "we be put in Local 55." Poole flatly rejected this suggestion and added that he would not set a precedent by "switching companies from one local to another." Poole also stated that he did not think the wage rates paid by Respondent were too high.

On January 16, 1980, Clark, Carey, Hayes, and, possibly, Sayles met in advance of the 12th bargaining session held later that day between Respondent and the Union. In their meeting, Hayes stated that Piotrowski desired that, in the bargaining session to follow, Respondent offer a 1-year contract that would extend the expired agreement without change. Clark refused because Respondent wanted a new agreement with a 2-year term and because Piotrowski's suggestion did not comport with Respondent's bargaining objectives. Respondent's officials made clear that they would not sign a contract with a cost-of-living clause and without a cut in wages. Hayes warned that the Union was preparing for a strike vote.[9]

The minutes for the bargaining session show that Hayes and Sayles were both present, as well as one of the Union's attorneys. Clark began by relating that, since the last bargaining session held on December 17, 1979, he and Carey had met with representatives of the International Union in Chicago on December 19, and in Washington, D.C., on January 8. He stated a new proposal for an agreement. Respondent offered to continue the existing union-security and dues-checkoff provisions, to retain boning incentives as in the expired agreement, and to maintain wage rates under the expired agreement without change over a new agreement with a 2-year term. This represented a change from Respondent's position in prior bargaining sessions, wherein Respondent had rejected inclusion of dues checkoff and compulsory union membership in a new agreement while offering to increase boning incentives. Respondent had withdrawn its wage rollback proposal after the last bargaining session. Respondent's proposal also included all its previous positions such as pension, health plan, and the elimination of the arbitration clause.

Piotrowski responded that it was difficult to accept the 2-year wage freeze and the elimination of the Union's pension plan and the Union's clinic. International Representative Hayes stated that the Union could not agree to a 2-year contract without economic improvements and stated that this was a "gut" issue. The Union also responded that the arbitration position of Respondent was unacceptable. Hayes stated that the Union did not condone criminal activities but that the Union did not want to sit in judgment of members when considering their cases for arbitration. Hayes stated that "the union does not want to be judge and jury."

[9] Hayes did not dispute Clark's testimony on this point although his version did not mention the 1-year extension of the old contract.

Later in this bargaining session, the Union countered that it was willing to accept a 1-year extension of the then-expired agreement with the retention of the Union's pension program, arbitration provision, and clinic. Following consideration of the Union's revised demands, Clark stated that Respondent would agree to a new agreement over a 2-year term with a wage reopener to determine second year wage rates, but Respondent's remaining proposals were basically unchanged from the preceding offer. Following the last change in Respondent's bargaining stance, Clark warned:

> [I]f this proposal fails to persuade you to sign the contract, we will maintain this position, even if it takes a strike to do it, as you have this right to do, but we will continue to operate and have a legal right to hire permanent replacements for anyone and everyone who strikes.

In response to Respondent's most recent offer, Piotrowski said he would place it before the Union's membership for a vote in a meeting on January 17. He said also he would phone Clark the following day to tell him the results of the meeting.

By letter dated January 17, 1980, Clark described to employees Respondent's proposal which he believed had been accepted by the Union in a 2-year contract. In that letter he detailed the contract stating that the employees would continue their same wage rate for 1 year and would be entitled to keep whatever union benefits they had already earned in past years. However, no new pension contribution would be made to the union pension fund. The letter also indicated that, on or about October 19, 1980, hourly wages for the second year of the contract would be discussed at the bargaining table.

The contract proposal was rejected and, on January 18, 1980, the Union commenced a strike at Respondent's facilities.

### c. *The strike settlement and the agreement of February 28, 1980*

The minutes for the 13th bargaining session held on February 4, 1980, show that Sayles and an attorney for the Union were among those present. At the outset, Clark stated that the bargaining session scheduled for January 30 was canceled because of court proceedings held that day. Clark also complained about alleged misconduct on the picket line. The parties exchanged counterproposals but there was no agreement. Piotrowski ended the meeting by accusing Respondent of not bargaining in good faith.

On February 11, Clark, Carey, Hayes, and Sayles met again at Chez Paul Restaurant. Initially, they discussed the work stoppage then more than 3 weeks in progress. Clark again mentioned the possibility of "switching" Respondent from Local 100 to Local 55. Hayes reiterated that the International Union's president, Wynn, was the only one who had authority to do this, and that he was then attending a convention in Florida. Hayes suggested a meeting with Wynn "to see if we couldn't work out an agreement." Hayes left to phone Wynn and, when Hayes returned, he said that Wynn had agreed to a meeting in

Florida on February 13. Hayes also said he wanted Poole and Piotrowski present at this next meeting.

On February 13, Clark, Carey, Hayes, Sayles, Poole, Piotrowski, Wynn, and Jay Foreman, an executive vice president of the International Union, met in Wynn's suite at the Doral Hotel in Miami Beach, Florida. The Union's work stoppage was discussed, as were the respective positions of the parties in bargaining at that time. Also discussed by Clark was the possibility of a "switch of jurisdiction from Local 100 to Local 55." Wynn responded that he had heard Piotrowski was a good administrator and union leader, and that he saw no reason for such a switch which could, in any event, set an undesirable precedent. Wynn suggested that the parties attempt to reach a settlement with him. Wynn stated that he was not opposed to Respondent substituting its pension plan for that of the Union, ahd that he did not care if Respondent discontinued contributions to the union-sponsored clinic. However, he said there were "certain things" he wanted included in a new agreement between the parties, such as arbitration, union security, and checkoff.[10]

On February 21, Clark, Carey, and Hayes met again at Chez Paul Restaurant in Chicago. By this date, Respondent had replaced a significant number of striking employees and was operating both of its plants. Hayes said he wanted to "salvage the operations." He expressed concern that the bargaining unit would soon be lost since he had heard there was an "imminent back-to-work movement" among employees "on the [picket] line" and he did not wish to see this happen. He inquired whether it was possible to "work out a contract." Clark then proposed the following as alternatives to reaching a settlement: (1) A 1-year contract without a wage increase, cost-of-living adjustments, compulsory union membership, checkoff, or arbitration; or (2) a 2-year contract with region 12 of the International Union or its Local 55 that would include compulsory union membership, checkoff, Respondent's pension plan, and increased health and welfare benefits in place of a contribution to the union-sponsored clinic. Hayes saw a possibility of settlement and suggested another meeting with Wynn, who Hayes said had the authority to conclude a new agreement.[11]

On February 25, Clark, Carey, Hayes, Wynn, and William Orwell, another International Union vice president, met again in Wynn's suite at the Doral Hotel in Miami Beach, Florida. Clark reiterated the alternative proposals outlined to Hayes in Chicago a few days earlier. Wynn, who had been told by Hayes that the Union's situation was "almost a lost cause," said he was prepared to agree to a settlement in order to "salvage matters." After Wynn rejected Clark's proposal for a 1-year agreement, Wynn proposed a settlement in a contract over a 2-year term with: Wages "frozen" the first year and a wage reopener to establish wage rates the second year; a union-shop provision; a new employer-sponsored pension plan; increased health and welfare benefits in the place of contributions to a union-sponsored clinic; and a "two tier" wage structure.[12] Furthermore, Wynn stated that, in order to resolve the strike between Respondent and the Union and for the purpose of effectuating a settlement, the new agreement was to be "a joint contract with Local 100 and the International Union," with the latter to become "solely responsible for the administration of the contract." Wynn added that he did not want reference to the International Union shown on the face of the new agreement. Instead, he suggested that an appendix be affixed to the back of such agreement, which would be executed on behalf of the International Union. According to Clark, Wynn also stated that, if Respondent experienced difficulty with the new agreement, Wynn should be informed and Respondent could "switch jurisdiction" from Local 100 to another, although probably not Local 55. Clark stated that Wynn's proposal was satisfactory to Respondent as a basis for settlement of a new collective-bargaining agreement.[13]

Thereafter, a strike settlement agreement, dated February 25, 1980, was concluded to permit striking employees to return to work following Respondent's dismissal of the strike replacements hired since the inception of the Union's work stoppage several weeks earlier. Respondent preserved the right to discipline or discharge employees who engaged in strike misconduct. The terms of the agreement provided that the Union's strike against Respondent was to end on March 1, at 12:01 a.m.[14]

On February 28, Clark, Carey, Hayes, and Piotrowski met in Hayes' office where a new collective-bargaining agreement was executed for a term effective March 1, 1980, to December 19, 1981. The signers of this agreement were Clark, on behalf of Respondent; Hayes, on behalf of the International Union; and Walter Piotrowski, on behalf of the Union. The agreement expressly identified the parties as Respondent and the International Union "with its subordinate body, Local 100, Beef Boners and Sausage Makers Union (see attached Appendix A), hereinafter collectively referred to as the Union." Before the agreement was executed, Piotrowski had some second thoughts or reservations about the agreement. Hayes testified that Piotrowski's reservations dealt with that portion of the agreement and its appendix

[10] The above is based on the credited testimony of Clark. Hayes' testimony on this meeting was rather conclusory but was compatible with Clark's version.

[11] In his testimony Hayes failed to mention any meeting on February 21, nor did he deny that such a meeting had occurred.

[12] Basically, this involved less pay for newly hired employees, who would thereafter never progress to the higher wage rates paid more senior employees. As a consequence, while new hires were to enjoy the same wage increase due other employees, there would thereafter always exist a spread in the wage rates between newly hired employees and other employees.

[13] The above is again based on the credited testimony of Clark. Hayes' version is again conclusory but not significantly in conflict with that of Clark. Hayes testified as follows:

> Mr. Wynn said at that meeting that he was prepared in order to salvage what I had pictured to him to be almost a lost cause, he was prepared to execute an agreement with AMPAC along in conjunction with the local union, providing for, on behalf of the local union, I forget, either in conjunction with or on behalf of the local union, that would enable us to continue to operate, but he was not going to remove the members from that local into another local union.

[14] The strike settlement agreement also contained a provision ending Respondent's participation in the union-sponsored pension plan to which it had been committed during the previous contract. Respondent agreed to make a final contribution of over $15,000 to the plan to fulfill its entire liability to the plan for past benefits for its employees.

which stated that the agreement would be administered by the International Union. According to Hayes, he told Piotrowski that if he did not want to execute the agreement "along these lines" he did not have to do so. According to Clark, Hayes told Piotrowski if he did not sign he "might as well go back on strike again." Piotrowski acquiesced and executed the new agreements.

Attached to the new collective-bargaining agreement between Respondent and the Union was a single page captioned "Appendix A," which was made effective February 25. The appendix was executed on behalf of Respondent by Clark, and on behalf of the International Union by Hayes. In pertinent part, the appendix recited that it was a "[S]upplemental Agreement" and:

> WHEREAS [Respondent] and the International Union have, after Collective Bargaining, executed a Collective Bargaining Agreement;
>
> WHEREAS, the International Union's subordinate body, Local 100 . . . is also a party to said Collective Bargaining Agreement:
>
> NOW THEREFORE, the International Union and [Respondent] agree:
>
> 1. That notwithstanding that Local 100 is also a party to the above mentioned Collective Bargaining Agreement, the International Union will be solely responsible for the administration of [such] Agreement.
>
> 2. That in the event that it becomes necessary for the International Union to delegate routine items of such administration to staff representatives of Local 100, the International Union will give advance notice to the Respondent of that fact, stating the nature of such delegation and the probable duration of such delegated items.
>
> 3. The notice required by Section 8(d) of the National Labor Relations Act for the collective bargaining that will occur . . . incident to the wage reopener, will be filed by the International Union, who will actually conduct such Collective Bargaining with [Respondent] and who will not delegate such responsibility to Local 100.

A day or so after the execution of the new collective-bargaining agreement and its Appendix A, the Union held a membership meeting at which Hayes was also present. He explained the content of the new agreement to the membership. He also read the content of Appendix A, and this was followed by his explanation of its content. He finished by recommending that the membership adopt and ratify the new agreement and Appendix A. Thereafter, Hayes' remarks were interpreted to the membership in the Polish and Spanish languages for the benefit of the members present who understood only one or the other of these languages. Subsequently, a vote was taken, which resulted in a majority of the members present voting to accept the new agreement, including Appendix A.[15]

[15] At some point during the final negotiations which led to the agreement of February 28, 1980, Hayes expressed misgivings to Clark that such agreement failed to contain a provision for arbitration. Clark assured Hayes that Respondent would be willing to submit disputes with the Union to arbitration on an *ad hoc* basis.

d. *Dealings under the agreement of February 28*

On March 24, 1980, Hayes wrote Clark to relate that there were several grievances that required discussion "in compliance with Paragraph 2 of Appendix A of the existing agreement between [the] International Union and its subordinate body, Local 100." In his letter, Hayes designated Joseph Piotrowski and John Lassiter, officers of the Union, to represent the Union in the discussion of such grievances. Hayes also designated them "to make visitation to the plants at regular weekly intervals in order to fulfill the wishes of our members."

On March 27, Clark replied to Hayes' letter, indicating that the designation of more than one agent "was unnecessary and inappropriate." It was Respondent's position that the Union had only utilized one servicing representative to visit the plants in the past.[16] Clark also pointed out that there was an adequate number of the Union's stewards in Respondent's plants so that any need for Polish and Spanish interpreters was satisfied.[17] In conclusion, Clark noted that Hayes had named Joseph Piotrowski and Lassiter as servicing representatives, but that Respondent would agree only to the designation of Lassiter "since Joseph Piotrowski is unacceptable by reason of his behavior."

On March 28, Hayes wrote to Clark, stating that he was in "total disagreement with your interpretation of Paragraph 2, Appendix A of the existing agreement." He went on to protest that Clark had no right to select union representatives and he made the additional designation of Rueben Ramirez "so that we will have at least two representatives at all times to meet with the Company."

At some point, during this period, Clark and Hayes met and discussed the matter of servicing representatives for purposes of contract administration at Respondent's plants. In this connection, Clark said that he, of course, could not tell Hayes whom he could select to service such plants. However, Clark sought to persuade Hayes that he not insist on Joseph Piotrowski "because of the bad experience [Respondent] had with [him] in the past on handling grievances and arbitrations; it was hard to do business with him." Clark also sought to persuade Hayes not to designate Ramirez. In doing so, Clark referred to an altercation that had occurred between Ramirez and Albert Mojica, Respondent's general superintendent, during the recent strike. Clark expressed the view that it would be unwise to permit Ramirez into the plants because Labor Board and criminal charges had been filed over the altercation and some were still pending. Clark stated that, under the circumstances, Ramirez and Mojica would not "get along" in the plants "with

[16] Joseph Piotrowski testified that he was the servicing representative on behalf of his Union for Respondent's two plants since 1972. He was the only representative until about 1978 when he occasionally took Reuben Ramirez, who speaks Spanish, along with him to the plants. Piotrowski also occasionally brought along Lassiter or appointed him to service the plants if he was unavailable.

[17] In 1980 there were two stewards (one Spanish speaking) at the Normal Avenue plant and four stewards (one Polish and one Spanish speaking) at the Racine Avenue plant.

these charges over their heads" when "[t]hey would have to interact daily."

According to Clark, Hayes was not completely satisfied with Respondent's position, but he agreed that only Lassiter would be the servicing representative. Hayes did not dispute this testimony nor did he testify about any conversations he may have had with Clark about the problem of servicing representatives from March to September 1980. Clark subsequently conferred with Lassiter about his role as servicing representative. Clark assured Lassiter of Respondent's full cooperation in the performance of his duties. He was promised access to either of Respondent's plants "at any time," in the same manner as had servicing representatives in the past. Lassiter was also told that if he required an interpreter one would be provided him. Lassiter accepted the offer but stated that he would first deal with Spanish- and Polish-speaking stewards.

Lassiter testified that from the date—sometime in April—when he took over as servicing representative until early September 1980, when a new agreement with the Union was reached and Ramirez and Piotrowski took over as servicing representatives, he "had no problems" in servicing the needs of employees. He also had no problems with obtaining interpreters when they were needed.

On March 13, 1980, Clark wrote Hayes that checkoff authorization cards given to him that day were "invalid" because they named the Union as recipient of the moneys checked off. Clark reminded Hayes that, under Appendix A of the then-current collective-bargaining agreement, the International Union was "solely responsible" for the administration of such agreement. Further, Clark wrote that Respondent would only check off dues "to your office" and that:

> New authorization cards must be obtained which designate Region 12 of the International Union, in order for the check off authorization to be effective. How Region 12 disperses the funds is, of course, none of [Respondent's] affair.
>
> Please instruct the officers and agents of Local 100 concerning the effect of Appendix A because thus far they are attempting to operate . . . as if Appendix A does not exist.

On April 17, 1980, Hayes wrote Clark requesting and authorizing him to deduct dues in accordance with checkoff authorizations on behalf of the Union. He also asked that the dues be sent to the Union. In reply, Clark wrote Hayes that it remained Respondent's position that:

> Section 302 of the Taft-Hartley Act must be strictly construed and therefore only the labor organization that is "solely responsible for the administration of the Collective Bargaining Agreement" is legally empowered to be the designee of such an authorization card and the recipient of funds therefrom. Therefore, I once again seek to persuade you to obtain authorization cards which designate only the International Union, whereupon [Respondent] will promptly remit such funds directly to your organization. You have then merely to endorse the check to Local 100.

Although Clark expressed Respondent's willingness to check off dues to the International Union pursuant to proper authorizations from employees, the International Union refused to provide Respondent with checkoff cards for this purpose. Respondent was provided only with cards naming the Union as recipient of the dues. The International Union also advised Respondent that it "had a problem, that [it] did not have any procedure that was set up for accepting these dues."

On July 1, 1980, Walter Piotrowski, on behalf of the Union, wrote its members requesting that they pay their monthly union dues directly to Local 100 inasmuch as Respondent had refused to "honor the dues check-off authorization cards which were signed by such members and furnished to [Respondent]." On July 14, Clark wrote employees that, while the collective-bargaining agreement with the Union required union membership, the Union had no authority to demand the discharge of any employee for failure to pay dues—only the International Union had such authority in accordance with Appendix A of the agreement. Clark told employees that the only reason why dues were not being deducted from the pay of employees was because Respondent believed that applicable law required dues authorizations to be directed only to the International Union.

e. *Negotiations for a new agreement*

On July 31, 1980, Hayes notified Clark by letter of his desire to reopen the existing collective-bargaining agreement in regard to the subject of wages, only. On August 4, 1980, Clark wrote employees and stated that there had been a dispute with the Union concerning dues checkoff, which had placed the International Union "in the middle of this dispute," and that the latter wanted Respondent to resolve its "differences" with the Union to permit dues to be checked off "directly to Local 100, and Appendix A of our present contract can also be made unnecessary." Clark also stated that: "In an effort to settle this dispute and to take . . . Hayes out of the middle, I have suggested to both . . . Hayes and Local 100 that [Respondent] open early negotiations, not on the wage reopener that is scheduled for October 1980, but for a new contract that will run from now until December 19, 1982."

On August 8, 1980, International President Wynn wrote Carey that Wynn had learned that Respondent and the Union were soon to commence collective-bargaining negotiations for a new collective-bargaining agreement. He stated that, if a new agreement was not reached, the present one would remain in full force and effect for its term; but that if a new agreement was concluded and ratified, the parties to it would be only Respondent and the Union, and that Appendix A of the current agreement would be stricken in its entirety and all reference to the International Union deleted. In closing, Wynn assured Carey "that in the light of the foregoing conditions the International Union agrees to the International's deletion from the contract."

On August 11, collective-bargaining negotiations for a second new collective-bargaining agreement between Respondent and the Union commenced. On August 13, after 3 days of negotiations, the parties concluded a settlement for a new agreement effective for the period from September 1, 1980, to December 19, 1982. The second new agreement was executed only by representatives of Respondent and the Union on September 2, 1980. As a part of this newest agreement, there was a provision for the checkoff of union dues and initiation fees to the Union where an employee provided Respondent with a proper authorization form for such payment.

After the second new collective-bargaining agreement became effective around September 1, the Union designated Joseph Piotrowski and Ramirez its servicing representatives in Respondent's plants. From September onward, both Joseph Piotrowski and Ramirez have been the Union's servicing representatives in such plants.

In October, following the execution of the second new collective-bargaining agreement on September 2, Respondent began again to check off union dues from the paychecks of employees and remit such dues directly to the Union. Then or shortly after Respondent began to check off such dues, the amount of moneys checked off was doubled to twice the normal monthly amount. It was agreed by Respondent and the Union that the checkoff of double dues each month would continue for a period of about 6 months, at which time the Union would have received moneys in an amount equal to that which it would otherwise have received pursuant to checkoff during the period that Appendix A was viable. The General Counsel concedes that Respondent "has in fact made up dues payments from March 1 through August 1980."

2. Discussion and analysis

Section 8(a)(5) of the Act, read together with Section 8(d), requires an employer to bargain in good faith with the union representing its employees. Each party to the collective-bargaining process must make "a serious attempt to resolve differences and reach a common ground." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 486, 487, 488 (1960). While one party may not approach the bargaining table with a closed mind, neither is he bound to yield any position fairly maintained. "Nor may the Board . . . directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements," for the Act does not regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 402, 404 (1952), affg. *American National Insurance Co.* v. *N.L.R.B.*, 187 F.2d 307 (5th Cir. 1951). *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229, 232 (5th Cir. 1960).

Applying these principles to the facts of this case, I find that the General Counsel has not proved by a preponderance of the evidence that the prestrike bargaining positions and conduct of Respondent showed a desire not to reach agreement or to bargain in bad faith in violation of the Act.

The General Counsel points particularly to three of Respondent's bargaining positions to support his contention of unlawful conduct: The rollback of wages together with the elimination of any cost-of-living adjustments; the elimination of mandatory union security and union dues; and the elimination of any arbitration provision. These positions cannot, however, be viewed in isolation. They must be considered in light of Respondent's explanations for its positions, its conduct on other issues, the Union's responses, the evolution of Respondent's positions, and its willingness to vary its positions. For example, Respondent proposed increases in health and pension benefits which were ultimately accepted by the Union. These increases, together with Respondent's agreement to the Union's proposed night-shift premium, offered employees some benefits to be weighed against the loss of a cost-of-living adjustment and the wage rollback. Of course, the wage rollback was subsequently modified and no cutback in wages took place. Even so, Respondent's position on wages was fully explained. The Union had refused to grant relief to Respondent the year before negotiations began when Respondent was in fact losing money. Because of the Union's failure to cooperate at that time, Respondent sought to recoup the same amount through a wage rollback in negotiations even though the next year it did not plead a loss in earnings. Respondent has convincingly shown that its profit margins are precarious and dependent to some extent on controlling labor costs. It also took the position that it was paying its employees too much money in comparison to the jobs they were doing and what other comparable employers with union contracts paid. These views were expressed to the Union and the issue was thrashed out at the bargaining table. The Union felt so strongly that it called a strike and, after the strike, signed contracts to resolve the dispute. Nothing that Respondent did or said at the bargaining table with respect to the wage issue would justify overturning the results of free collective bargaining.

Nor were Respondent's other positions improperly motivated or unyielding. In early December 1979, at the ninth bargaining session, Respondent suggested a trade to the effect that, if the Union agreed to Respondent's wage proposal, Respondent would agree to the withdrawal of its proposals for the elimination of compulsory union security, dues checkoff, and arbitration. Thereafter, on January 16, 1980, at the 12th bargaining session, Respondent again indicated its willingness to accept compulsory union security, dues checkoff, and retention of boning incentives as they appeared in the then-expired agreement, if the Union would agree to maintain the wage rates then in effect in an agreement for a term of 2 years. When the Union demanded an extension of the expired agreement for 1 year, Respondent reoffered its prior proposal but with a wage reopener in the second year. The Union rejected this as well as Respondent's other proposals. In these circumstances, it is clear that Respondent, while firm on its desire to hold down wages, was willing to yield, particularly on arbitration, union security, and dues checkoff, in order to reach agreement. Respondent's positions on each of these other issues were explained to the Union. It explained its reluctance to agree to these

provisions because of its perceived view that the Union had been uncooperative in granting wage relief and in proceeding to arbitration on cases without merit. Nevertheless, it offered to yield on these issues if the Union would agree to its modified wage proposal. The Union declined. Even after the strike commenced, Respondent sought to vary its proposals and, of course, Respondent pursued a settlement of the strike and an agreement with the Union's parent—and ultimately with the Union alone—which contained dues-checkoff and union-security clauses. Respondent's efforts in this respect belie any contention that it was not seeking an agreement or was not bargaining in good faith.

In view of my findings set forth above, I also reject the contention of the General Counsel that Respondent bargained in bad faith by encouraging the Union to strike and by sending letters to its employees setting forth its bargaining positions. The minutes of the bargaining sessions show that both parties were flexing their economic muscles. Union Representative Walter Piotrowski warned of a possible strike ahd Respondent, through its chief negotiator, Clark, indicated that Respondent was willing and prepared to take a strike. Nothing in Respondent's conduct and statements evidenced bad-faith bargaining or a cast of mind against reaching agreement. The same can be said for the contents of the letters to employees. Since none of Respondent's bargaining positions or tactics was unlawful, its representation of its bargaining positions to the employees fairly reflected hard but lawful bargaining. It can aptly be said here, as in *W. G. Best Homes Corporation*, 253 NLRB 912, 921 (1980), that "what emerges from this extensive record is a test of economic strength between Respondent and [the Union] . . . . In that contest it is not the function of the Board to assist one to the detriment of the other."[18]

[18] The Charging Party asserts that Respondent's position in successfully pressing for its own pension plan rather than the Union's multiemployer plan was evidence of bad-faith bargaining. This specific allegation was not part of the complaint, and, despite some evidence on the point, was not fully litigated. Respondent was not on notice that it was required to defend its position on pensions and did not organize its presentation to meet such an allegation. Even on the merits, however, the Charging Party's assertion is unavailing. First of all, the pension issue cannot be considered in isolation from Respondent's other positions and conduct. But even focusing only on the pension issue, Respondent bargained in good faith. Respondent's pension proposal called for greater benefits than under the Union's plan. Respondent was also entirely within its rights in arguing that a corporate-sponsored plan would encourage loyalty and discourage turnover. Although Respondent's plan of necessity could not fund all past credits earned, the admittedly young work force—the average age was 35—would have an excellent opportunity to cash in on the better retirement benefits offered by Respondent. The Charging Party argues that those employees with less than 8 years' service—of which there were admittedly "quite a few"—lost pension benefits. Perhaps they did. The record is not clear on this point although presumably they will retain the credits they earned under the Union's plan and may build on them if in the future they become employed under the Union's plan. But Respondent agreed in the strike settlement agreement, which was, of course, part of the negotiations, to pay a lump sum settlement to vest those employees with 8 years' service or more in the Union's plan. This is not the conduct of a bad-faith bargainer. Indeed, Respondent's conduct with respect to the pension issue—although keyed to its self-interest—was sufficiently beneficial for employees that it reflects on the good faith of Respondent and its willingness to grant economic benefits in exchange for some "take aways." The Union's position on this issue, in contrast, seeks to have the Government rescue it from a deal made at the bargaining table which it now finds embarrassing.

The General Counsel also alleges that Respondent engaged in bad-faith bargaining by refusing to abide by an alleged extension of the expired bargaining agreement and by withdrawing recognition from the Union. As I have indicated, I do not credit the testimony of Hayes that Respondent agreed to extend the old contract. The expired contract was not extended. Thus, the failure of Respondent to continue the union-security and dues-checkoff provisions of the expired contract was not unlawful.

Nor did Respondent ever decline to recognize the Union or withdraw recognition from the Union. The General Counsel alleges in his brief that Respondent "sought to avoid its bargaining obligation with Local 100" by entering into "Appendix A." This contention is ludicrous. The evidence clearly shows that International representatives, including Hayes, injected themselves into the negotiations before the strike. They participated in efforts to settle the strike and to salvage the jobs of employees who had been replaced; and they effectuated an agreement under somewhat unorthodox circumstances. However, the Union acquiesced in the participation of the International as well as all of the efforts of the International to reach an agreement with Respondent. The agreement provided not only for the end of the strike but also for a lump sum payment by Respondent to the Union's pension fund for past service credits for some of its employees. The agreement signed by all parties, including the Union, stated that the agreement was between Respondent and the International Union "with its subordinate body [the Union]" and specifically referred to Appendix A which was signed only by the International. Appendix A specifically states that the International "will be solely responsible" for the administration of the agreement notwithstanding that the Union "is also a party" to the agreement. Piotrowski, on behalf of the Union, was fully aware of the significance of Appendix A when he signed the agreement on February 28, 1980. And the membership of the Union was fully aware of the significance of Appendix A because at a meeting wherein they ratified the agreement both the agreement and Appendix A were read to them and explained to them by Hayes, the International representative. The Union not only acquiesced in the International's commendable and valuable participation in the negotiations but ratified the fruits of that participation. In these circumstances, I reject any contention that Respondent violated the Act by entering into the February 28, 1980, agreement with the International and the Union or that Respondent at any time withdrew recognition from the Union.

The General Counsel also alleges that, in applying Appendix A, Respondent violated the Act in two respects, first by refusing to check off dues to the Union and insisting instead that they be checked off to the International, and, secondly, by objecting to the designation of two union officials to police the agreement.

As shown above, the International designated three officials of the Union, Joseph Piotrowski, Reuben Ramirez, and John Lassiter, as servicing representatives for the purpose of policing the agreement. Respondent objected to Piotrowski and Ramirez. It objected to Piotrowski be-

cause of what it perceived a lack of cooperation on his part in the past, particularly in submitting cases to arbitration which Respondent thought should not have been submitted. Despite this objection, Joseph Piotrowski was apparently permitted to act as a union representative in the interviews of employees who were suspended for misconduct after the strike. Respondent objected to Ramirez because he would be dealing with Mojica and the two had recently been involved in an altercation which had spawned Labor Board and criminal charges. Respondent thought that the two could not work together on grievances. Respondent also took the position, which is supported by the record, that only one servicing representative was utilized in the past.

The uncontradicted testimony of Clark is that Hayes, while at first objecting to Respondent's position on Ramirez and Piotrowski, acceded to Clark's position that only Lassiter should be designated as servicing representative. Since Hayes had the sole authority to administer the contract under Appendix A, he was authorized to agree with Clark's position as he did. Thus, whatever would be the situation had Respondent *insisted* over Hayes' objection upon the exclusion of Ramirez and Piotrowski, there could be no violation of the Act where, as here, Hayes *agreed* to such exclusion.

Respondent's reason for excluding Ramirez was reasonable and proper in the circumstances. Its exclusion of Piotrowski, on the other hand, was not rationally based. There was no arbitration provision in the contract and thus he would not be in a position to force arbitration in unmeritorious cases as Respondent feared. However, Hayes may have been convinced by Clark that Piotrowski's presence at the plant might cause bad feelings which he wished to avoid, particularly since the parties would shortly have the opportunity to reopen the agreement. In any event, Hayes did agree to the exclusion of Piotrowski. The exclusion of these two officials did not adversely affect the representation of the employees herein. Lassiter was provided with sufficient stewards who spoke both Polish and Spanish to police the agreement. And Respondent did not object to the individuals who were designated as stewards. Lassiter testified he had no problems in the several months that he was the servicing representative. This situation obtained until September 1980 when Appendix A was superseded by an agreement which specifically provided for administration by the Union. At that point both Ramirez and Piotrowski were designated and acted as servicing representatives. Thus, even if, in the unique circumstances of this case, Respondent had technically violated the Act by not accepting the designation of Piotrowski and Ramirez, there was no adverse impact on employee rights in the short period that they were not servicing representatives and no remedial order is required at this time.

The General Counsel also alleges that Respondent violated the Act by failing to honor dues-checkoff cards signed by employees on behalf of the Union and insisting instead that they designate dues to be paid to the International. This issue too turns on the unique circumstances of this case. Respondent took the position that Appendix A of the agreement of February 28, 1980, required that the dues be tendered only to the International and that Section 302 of the Act, which prohibits the transfer of funds from an employer to a union except under certain circumstances, precluded the payment of dues directly to the Union. Respondent suggested that the International could transfer the dues to the Union but that the authorizations would have to name the International and the moneys would have to be paid directly to the International.

The General Counsel argues that Respondent's reading of Section 302 to preclude the payment of dues to the Union is erroneous and that an employer may check off dues and make payments to a union "even in the absence of a contract" where the employees designate the union as the recipient of the dues payment. The General Counsel cites Section 302(c)(4) of the Act which states that the section is not applicable "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, that the employer has received from each employee . . . a written assignment which shall not be irrevocable for a period of not more than one year, or beyond the termination date of the applicable collective bargaining agreement whichever occurs sooner."

The question presented by the General Counsel's allegation is an interesting one but hardly worth its litigation in the circumstances of this case. The checkoff provision of the February 28, 1980, agreement refers to a form authorization which was attached to the agreement as Appendix B. That form specified the designee as the Union, not the International. The International also insisted that it desired the dues to be paid to the Union directly. In these circumstances, Respondent probably should have acquiesced and paid the dues directly to the Union notwithstanding the thrust of Appendix A, namely, that the International was to have sole responsibility for administering the agreement. However, in view of the unique arrangement surrounding the agreement of February 28, 1980, and the application of Appendix A, Respondent's insistence that the dues be remitted directly to the International did not constitute bad-faith bargaining, particularly in light of the eventual resolution of this issue. The dispute as to which entity would be the nominal representative in the administration of the contract was resolved in September. Today, dues are being checked off directly to the Union. All back dues for the period from March through September 1980 have been paid. There is no need for the Labor Board to concern itself with an academic question such as is presented by the General Counsel. Accordingly, I shall dismiss this allegation of the complaint as well.[19]

[19] The parties have made much of a separate allegation in the complaint that Attorney Joseph Carey was an agent of Respondent. The reasons for this high pitched conflict are beyond the scope of this proceeding since such a finding has no practical significance. Carey was an agent of Respondent insofar as his statements are binding on Respondent in connection with the substantive allegations of the complaint. However, neither Carey nor Kane-Miller—of which he is an officer—is named as an individual respondent. Nor does the General Counsel seek an order against Carey or Kane-Miller. The entire conflict is much ado about nothing and I suggest that the parties forget about it.

### B. *The Status of the Strike*

It is clear from the evidence that the employees and the Union decided to strike because of the bargaining positions and posture of Respondent. I have found that Respondent's bargaining positions and posture before the strike of January 18, 1980, did not constitute bad-faith bargaining within the meaning of Section 8(a)(5) and (1) of the Act. Accordingly, the strike herein was an economic rather than an unfair labor practice strike.

### C. *The Discharge of Striking Employees for Alleged Picket Line Misconduct*

In the course of the strike, Respondent received information about the possible misconduct of some striking employees while they were on the picket line. As a result of initial reports focusing on individual named employees, a number of them were suspended pending a further investigation into the alleged acts of misconduct. The notices of suspension, dated March 7, 1980, informed employees that they would be interviewed as part of the investigation and asked them to consult their union representative.

Following Respondent's investigation into the alleged strike misconduct, which included holding interviews with and taking affidavits from witnesses and other employees, Respondent afforded each of the 10 accused employees an opportunity to be heard. At these interviews, representatives of the Union and the International Union were present. A translator was provided where needed. Notes were taken by Clark's secretary which were thereafter transcribed for review by Clark. In these interviews, the accused employees were asked whether there were any witnesses that they desired Respondent to contact in the investigation. Where names were mentioned, Respondent interviewed those witnesses and notes were also taken of those interviews.

After reviewing all the notes of the interviews and as a result of Respondent's investigation, Clark concluded that 10 employees, all of whom had previously been suspended, should be discharged for strike misconduct. On March 25, 1980, these employees were notified of Respondent's decision by letter.

On March 24, 1980, Hayes submitted a "formal grievance" on behalf of the employees who had not been reinstated after the strike. On April 3, 1980, Respondent answered the Hayes letter by referring to a conference between Lassiter and Albert Mojica on the matter. Respondent stated that the 10 employees were discharged for strike misconduct. Respondent also stated that five of the employees were being reinstated pending a determination by the Labor Board as to whether their discharges were unlawful. Later Respondent decided similarly to reinstate two other employees. Only three of the discharged employees—L. V. Thomas, Jan Piton, and Stanley Karwaczka—were not reinstated.

Although Respondent submitted the documentary evidence it relied on in discharging all 10 employees in this proceeding, Respondent has not contested the General Counsel's allegations with respect to the 7 employees allegedly discharged for misconduct who were eventually reinstated. All seven of these employees took the witness stand. They testified that they engaged in the strike and picketing and they denied engaging in the alleged misconduct which led to their discharge. No witnesses were presented in this proceeding to rebut their testimony and the documentary evidence is insufficient to counter their denials that they engaged in misconduct. Accordingly, Respondent's discharge of these employees was improper since they did not in fact engage in the strike misconduct for which they were terminated. See *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

The evidence concerning the remaining three employees whose discharges are at issue is discussed below:

#### L. V. Thomas

On the morning of February 21, Amedo Orlino, a strike replacement at the Normal Avenue plant, appeared at the plant to report for work. As he got off a bus near the plant, he encountered two black men. One approached Orlino from the front, attempted to block him from proceeding toward the plant entrance, and asked Orlino where he was going. Orlino answered that he was going to work. As Orlino was speaking, he was struck from behind on the back of the head. The blow caused Orlino to stagger. He turned, looked behind him, and saw the face of his assailant whom he identified as L. V. Thomas.[20]

After he was hit, Orlino ran for the plant entrance, but the other man continued to obstruct his way. Orlino ran in another direction until he saw another employee he knew, Miguel Ramirez, in the front seat of a car approaching the plant. Ramirez, who had seen Orlino being struck, corroborated Orlino and identified Thomas as the assailant. He asked the driver of the car to stop and Orlino got into the rear seat. The car then proceeded to the plant entrance and Orlino got out.

Later that day, Orlino was X-rayed and was released from a local clinic. He then went back to the plant, punched out, and went home. Orlino testified that he did not know, nor could he identify, the second man because he focused primarily on the man who hit him. He had both men in his sight even after he reached the plant entrance because they followed the car the short distance from the point of the attack to the plant entrance.

As a consequence of Orlino's report of the incident of February 21, Thomas was suspended by Respondent. Thereafter, Thomas was afforded an interview by Respondent. In the interview, Thomas was asked if he had "anyone you want us to contact in your behalf." Thomas answered that he did not. However, at the hearing, Thomas testified that he was with Earl Warfield, another striker, the day that Orlino was hit and that Warfield told Thomas, at that time, that he, Warfield, had "slapped" Orlino. He also testified that Warfield again admitted, on March 3, the first day the employees came back to work after the end of the strike, that he had hit

[20] Orlino identified Thomas from identification card photographs shown to him during the investigation of this incident by Respondent. He also identified Thomas in person through a one-way mirror, presumably at the time of the interviews. At the hearing, Orlino again identified Thomas as his assailant by reference to the latter's identification card photograph.

Orlino. Warfield told him, "L.V. there is the guy that I slapped." According to Thomas, there were two or three people present when this was said. Thomas also testified to two other times when Warfield mentioned that he, Warfield, had hit Orlino, the last time being in the office of Thomas' attorney, where Warfield appeared pursuant to Thomas' invitation. Yet, Thomas never told Respondent of Warfield's alleged admissions even though Thomas admittedly had knowledge of them when interviewed by Respondent following his suspension, and even though he told Clark he had no witnesses to support his denial that he had struck Orlino.

Earl Warfield, who is 6 feet tall and weighs about 230 pounds, testified that he had been on picket duty with Thomas one morning when he approached Orlino who was going to work. Warfield advised Orlino that there was a strike and asked that he not report for work. According to Warfield, Orlino shifted his weight to his left foot and Warfield thought that Orlino was about to give him a karate kick. Then, according to Warfield, he put out his hand and brushed Orlino's shoulder.

Warfield testified that he told Thomas, on February 21, the day of the incident, that he had simply brushed Orlino's shoulder or "put him off balance." He testified that he spoke to Thomas about the Orlino incident one more time after Thomas was discharged but did not elaborate on the details of that conversation. Later, Thomas asked Warfield to go to his attorney's office and tell her that Thomas did not hit Orlino. Warfield identified a sworn affidavit he gave to Thomas' attorney on June 14, 1980, in which he stated that he had "shoved Orlino in the face" after arguing with him about the strike and "being frustrated at what he was saying . . . ."[21] In another sworn affidavit given to Respondent's counsel on February 13, 1981, a week before he testified, he stated that: "At no time during the period of the strike did I hit anyone. At no time did I tell Thomas I had hit a man." He admitted at the conclusion of his testimony that he was trying to help Thomas.

In rebuttal, Orlino denied that Warfield, a fellow employee and a "friend," had ever pushed him in the shoulder or the face. Orlino also testified that counsel for Respondent had brought him and Warfield together the prior week, at which time Orlino denied in the presence of Warfield that he had ever been touched by him.

I find that Thomas did strike Orlino as Orlino testified. Orlino was an honest and reliable witness. He was corroborated by another employee witness whose testimony was also reliable and straightforward. The testimony concerning the size of Thomas as compared with Warfield is insignificant. Nor is it significant that Ramirez thought that Thomas was the smaller of the two men and Orlino thought him to be the larger of the two. First of all, Thomas is 5 feet 8 inches tall. He is taller than Orlino who is 5 feet 5 inches tall and could well have been viewed by Orlino as "large" or larger than the second man. Secondly, and more importantly, I do not believe that Warfield was the other man. Warfield's testimony was completely unreliable. He told different people different stories and his prehearing affidavits conflicted not only with his testimony but also with each other. His whole testimony was motivated by a desire to help Thomas whose job was on the line. Moreover, Thomas himself was an unreliable witness. He allegedly knew about Warfield striking Orlino prior to the interview in which he was permitted to give his side of the story but he clearly stated he had no witnesses to offer in his defense and he never mentioned the Warfield "alibi" to Respondent. In these circumstances, I find that Thomas engaged in strike misconduct which clearly justified his discharge by Respondent.

[21] Prior to being shown the content of his affidavit, Warfield insisted that he had told Thomas' attorney that he "shoved [Orlino] in the shoulder."

### Jan Piton

On January 18, 1980, the first day of the strike, George Schiller, Respondent's controller, was asked to go from the Normal Avenue plant to the Racine Avenue plant, about 2 miles distant. Schiller drove to the Racine plant with two other passengers, James Dillon, Respondent's chief accountant, who sat in the front seat, and James Gutsell, who sat in the rear seat.

When Schiller and his passengers approached the entrance of the Racine Avenue plant in Schiller's car, they observed some 50 to 60 pickets around the gate. Another car in front of Schiller's was permitted into the plant by the pickets without incident. However, as Schiller drove up to the entrance gate, his car was surrounded by pickets who proceeded to "bang" on the car while yelling and screaming obscenities at Schiller and his passengers. The pickets forced Schiller to stop his car and they opened the front doors. As this occurred, one of the pickets "took a swing at [Schiller], hit the back of [his] head and grabbed [his] coat." Schiller then slowly moved his car forward. The man who hit Schiller held on to his coat until the forward progress of Schiller's car forced the man to release him.

This entire incident was observed by then Sergeant Brad Douglas Muirhead, Jr., a field supervisor employed by Wackenhut Security Agency. At the time, Muirhead was inside the plant entrance about 6 or 8 feet from the gate. From this vantage point, Muirhead saw pickets pound Schiller's car and heard them yelling obscenities at the occupants. He also observed one picket open the door on the driver's side, throw a punch at Schiller and pull him by the collar and the hood of his coat while attempting to drag him from his car before letting go. Shortly after the assault on Schiller, Muirhead had a conversation with Carey, the attorney for Respondent, who inquired whether Muirhead had seen what had occurred. A few days later, Muirhead was shown some photographs for the purpose of identifying the person who had hit Schiller. After viewing a number of photographs in Clark's office, Muirhead identified Jan Piton as the assailant.

Piton denied that he had ever stopped a car or hit or attempted to pull a driver out of a car under the circumstances testified to by Schiller and Muirhead, although he admitted he was picketing at the Racine Avenue plant on the first day of the strike.

In the course of Respondent's investigation into the incident involving Schiller, Piton was interviewed by

Clark. Piton refused to divulge to Clark the names of any witnesses he contended were available to support his denial that he had hit anyone or pulled anyone out of a car. Piton testified that he did not do so because he was told not to by a union representative. At the hearing, however, Piton named three witnesses, including Raul Sanchez, a fellow employee, who could corroborate his denial. None of these named employees was mentioned in the pretrial affidavit given by Piton to the Labor Board.

Sanchez, a union steward, was subpenaed by Respondent from Guadalajara, Mexico, and interrogated regarding the attack on Schiller. Sanchez testified that Piton stopped the car which Schiller was driving, the door opened, and Piton "had the arm of [Schiller]." He testified that he did not know if Piton hit Schiller, but he saw Piton try to pull the "driver out of the car."

The testimony of Muirhead and Sanchez is mutually corroborative insofar as they identified Piton as the person who stopped Schiller's car and attempted to pull him out of it. Sanchez, a friend of Piton's, did not see a blow struck but Muirhead did and, in this respect, he corroborates Schiller who could not identify his assailant. Dillon also testified. He generally corroborated Schiller, but he could not see what was happening on Schiller's side of the car because the door was being opened on his side of the car. I viewed all of these witnesses as reliable and their testimony cumulatively establishes that Piton did strike Schiller and attempt to pull him out of his car while Schiller was driving. Piton's testimony is not credible. He was not corroborated even though he named some people who allegedly could have testified on his behalf. One of those, Sanchez, actually contradicted Piton. Piton's conduct was serious. He not only struck an individual but interfered with a moving vehicle. In these circumstances, I find that Respondent properly discharged him for engaging in strike misconduct.

Stanley Karwaczka

On January 18, 1980, the first day of the strike, truckdriver George Mollet sought to deliver a trailer load of boars to Respondent's Normal Avenue plant between 10 and 11 a.m. As he approached the plant entrance with his tractor-trailer, he observed a number of pickets in front of the gate. Mollet stopped his tractor-trailer. A number of pickets gathered in front of the tractor and around the side yelling to Mollet not to enter the plant. One of the pickets walked by the driver's side of the tractor-trailer and, some seconds later, Mollet heard a "loud pop." Mollet got out of his cab and inspected his tires, believing one of them may have blown out. Mollet noticed that the air hose was disconnected from the tractor-trailer. After connecting the air hose, which took him a few seconds, Mollet reentered his cab and drove off. He returned and entered the plant, without incident. Mollet could not identify the person who disconnected the air hose although he noticed a man wearing a green jacket walking past his tractor-trailer just before he heard the pop. There was no damage to the truck.

The above events were witnessed by some of Respondent's employees who were looking out of a second floor window onto Normal Avenue. One, Henrietta Stashwick, had her head out an open window watching the pickets when Mollet's tractor-trailer first appeared. She observed the striking employees gather around it after it was stopped and saw a man in a green jacket position himself between the tractor-trailer, where he "put out his arm" and retracted it. She testified that she recognized the man in the green jacket and she called out his name.

In her direct testimony, Stashwick identified the man in the green jacket as "Joseph Wargacki," another employee who was discharged for alleged misconduct but later reinstated. She was adamant on this point. After cross-examination, Respondent's counsel stated that he believed that her identification was incorrect. The prior witness, Karwaczka, was brought into the courtroom, with the agreement of counsel for the General Counsel and after Stashwick gave a general description of the man she observed which fit that of Karwaczka. Stashwick attributed her admitted error to being "extremely nervous." I doubt this explanation. She seemed very confident in identifying Wargacki and only appeared nervous when she changed her testimony.

In a pretrial affidavit given about these events on January 18, 1980, Stashwick simply mentioned that she saw a man in a green jacket "reach between the cab and the trailer and pull something out." She did not mention Karwaczka by name. One of the office employees present with Stashwick, Joan Miller, testified that Stashwick mentioned Karwaczka's name later in the day. She did not hear Stashwick call out any name at the time the incident occurred.

Karwaczka testified that, on January 18, he appeared at the Normal Avenue plant around 5:15 a.m. and that he left to go home around 9:30 a.m., after receiving his paycheck from a supervisor. He denied that he had disconnected the air hose on any tractor-trailer that day. Also, while Karwaczka admitted to owning a green jacket, he asserted it was inside the locker room of the Normal Avenue plant on January 18, and that he had worn a black leather jacket on that day.

Richard Backert, superintendent of the Normal Avenue plant, testified that he distributed paychecks at that location between 10 a.m. and noon, and that Karwaczka was one of the striking employees to whom he gave a check during that period. He also testified that Karwaczka wore a green jacket. Backert noted Karwaczka particularly since Backert had earlier heard in the office that Karwaczka was "the guy that pulled the thing off the truck" earlier that morning. Backert also testified that he was involved about a week later in opening the lockers of about 180 striking employees to make such lockers available for strike replacements. When the lock on Karwaczka's locker was clipped and the locker contents inventoried, according to Backert, there was no green jacket inside the locker. However, he does not recall whether Karwaczka's personal belongings were ever returned to him.

I do not believe that Karwaczka was the person who disconnected the air hose on the morning of January 18. Karwaczka's denial seemed to me to be credible. He was

a candid witness who was not impeached on cross-examination. Respondent's evidence to the contrary is flimsy. The two office personnel who observed the incident and testified herein were speculating on the identity of the person who disconnected the air hose. The reports on this entire incident, which was one of several that occurred on this, the first day of the strike, were fraught with confusion and uncertainty. Stashwick did not even identify the person in the green jacket in an affidavit given the very day of the incident and, at the hearing, she confidently identified a person other than Karwaczka before correcting herself. Miller relied on what others had told her and Backert had likewise heard from unidentified office personnel that Karwaczka had been involved in the incident. All had participated in investigations and interviews by Respondent which had focused on Karwaczka and which solidified their identifications prior to the hearing herein. Moreover, I do not believe that Backert could have remembered what Karwaczka wore on January 18 when he was one of numerous employees given a check or what was not in his locker when he cleared it out as he did the lockers of 180 other employees. Nor can I be confident that Backert was entirely sure of the time when the checks were distributed so as to place Karwaczka on the premises at the time of the air hose incident. If, as he testified, Backert knew, prior to giving Karwaczka his check, that he had been identified as having disconnected an air hose, it is reasonable to assume that Backert would have mentioned it to him at the time. He did not. In all the circumstances, I find that the identification by Respondent's witnesses of Karwaczka as the person who disconnected the air hose is too speculative for me to base a finding and I therefore credit Karwaczka's denial that he was involved in the incident.

In any event, even if, contrary to the above analysis, I were to find that Karwaczka did disconnect the air hose, the incident is not significant enough to justify his discharge. There was no damage to the truck, it took seconds to reconnect the air hose, and the truckdriver was not impeded from eventually entering the plant. The discharge of a striker in these circumstances would give the impression that the employer was so interested in curtailing the right to picket and strike that he was willing to punish employees for minor incidents to that end. I therefore find that Respondent violated the Act by discharging Karwaczka for alleged misconduct while he was engaged in protected concerted activity.

### D. *The Alleged 8(a)(1) Violations*

Two current employees, Rudolfo Martinez and Willie Griffin, testified in support of the allegations in the General Counsel's complaint that Albert Mojica threatened and interrogated employees. The evidence shows that, during negotiations, Respondent sent letters to employees describing the negotiations and setting forth Respondent's positions. Mojica testified that there were many times when he had conversations with employees about the status of negotiations.

Employee Martinez testified that, on or about December 12, 1979, his immediate supervisor, Bals Gonzales, told him that Mojica wanted to see him in his office. When he got there, Mojica asked him why the employees did not form their own union. He also "understood" Mojica to suggest that if the employees left the Union they would not have their pay reduced by 94 cents. Mojica also told Martinez that replacements would be hired for employees who went on strike. Martinez also testified that he did not mention this conversation to his fellow employees. Griffin testified that, on or about the same day or a day later, he was called into Mojica's office by Mojica, himself. Mojica asked Griffin what he thought about the Union and whether he would rather have a voluntary union rather than a "mandatory one like you have now." Griffin said he liked the one he had at present. On cross-examination, Martinez admitted to bringing up the matter of the 94-cent rollback himself. He also admitted he was very "mad" at Mojica for having fired his brother, sometime earlier.

Mojica testified that Martinez came to his office on or about December 13, 1979, with questions about a letter of that date distributed to employees about the negotiations. Gonzales testified that Martinez approached him with questions about the letter and, as a result, he referred Martinez to Mojica. Mojica met with Martinez. He had the December 13 letter in front of him and he answered Martinez' questions about the 94-cent rollback. They discussed other issues including the possibility of a strike. Mojica denied asking that the employees form their own union or threatening to reduce wages unless the employees rejected the Union. He also denied questioning Griffin as the latter testified. According to Mojica, he saw Griffin outside his office reading Clark's letter. Mojica asked Griffin if he had any comments or questions and Griffin said he had none. Mojica denied that he invited Griffin into his office or that he had inquired whether Griffin liked a voluntary or mandatory union.

I credit Mojica's account of both conversations. His testimony was candid and included meaningful detail, particularly the fact that these employees had just received a letter from management which may have prompted some questions. Griffin testified on cross-examination that he may have seen and read the December 13 letter. Gonzales corroborated Mojica that Martinez had some questions about the letter and that he referred him to Mojica. Martinez himself testified he raised the issue of the 94-cent rollback. The testimony of Griffin and Martinez was devoid of context and not as clear or as detailed as that of Mojica and Gonzales. In addition, Martinez seemed to have a personal grudge against Mojica for firing his brother. Accordingly, I credit Mojica and Gonzales and I shall dismiss the allegations that Respondent violated Section 8(a)(1) of the Act by Mojica's remarks on December 12 or 13, 1979.

The General Counsel also alleges as unlawful "help wanted" advertisements placed by Respondent in the Sunday Sun-Times edition of January 20, 1980, the Chicago Tribune edition of January 21, 1980, and in certain Spanish and Polish language newspapers on or about such dates seeking replacements for striking employees. These advertisements read basically as follows:

LABORERS

Wanted for meat packing plants. Immediate openings. $8.31/hr. base labor rate. These employees will be permanent replacements for striking employees.

Since the strike herein was not an unfair labor practice strike and since, neither in the advertisements nor at any time, did Respondent threaten to deprive unfair labor practice strikers of their rights under the Act, the advertisements were not coercive or in any other manner unlawful. I shall therefore dismiss the allegation that the advertisements were violative of the Act.

The General Counsel also alleges that, on the day the strike ended, Albert Mojica assaulted a union representative, Reuben Ramirez, on public property in the presence of a number of picketing employees. The evidence presents two competing views, each held strongly by the antagonists and witnesses on their behalf. A fair reading of the evidence reveals that, in the early morning hours of February 28, Mojica arrived at the picketers' station across the street from the Racine Avenue plant with Raul Sanchez, an employee and a union steward. Sanchez, who had been drinking with Mojica earlier in the evening, invited Mojica to have a drink there. Mojica accepted and had a few drinks with the strikers. Sometime later, Ramirez appeared and told Mojica to leave. An argument ensued between the two men, which included some pushing and shoving, over whether Mojica belonged at the site. Mojica insisted that he had been invited. At one point following some shoving, Mojica grabbed Ramirez' cap and threw it into a fire barrel. At another point, Mojica struck Ramirez. Mojica and two other employee witnesses testified that Mojica patted Ramirez "lightly" on the face in an attempt to calm Ramirez. Ramirez and his two witnesses, one, another representative of the Union, testified that the slaps were more substantial. Frankly, I am unable to determine whether the slaps were substantial or who started the shoving and pushing.

I do not believe that the evidence set forth above is sufficient to establish a violation of the Act. Mojica was invited to the strikers' station which was on public property and engaged in an altercation with Ramirez who had come onto the scene in an attempt to eject him. I cannot conclude that Mojica was the aggressor nor can I conclude that any employee would have been restrained from engaging in protected activity by Mojica's conduct. From my observation of the witnesses and their demeanor I believe the fight involved the personalities of the participants as much as any disagreement over the labor dispute. No employees could have believed that they would be subjected to assaults from Mojica for striking or otherwise engaging in union activities. Nor was there any evidence that any employees were or could have been coerced by what transpired. I shall therefore dismiss this allegation of the complaint.[22]

[22] Even if I were to credit Ramirez' testimony in its entirety and if I were to conclude that Mojica's conduct "coerced" or "restrained" employees, I doubt very much if it would effectuate the policies of the Act or promote labor peace to make findings of a violation on this issue and to issue a remedial order. Over a year has passed since the confrontation. Memories are hazy as to exactly what happened, and, at present, Ramirez is acting as a servicing representative and presumably dealing with Mojica on an amicable basis.

CONCLUSIONS OF LAW

1. By discharging employees Frank Sekula, Jesus Gonzales, Juan Perez, Warren Mills, Alfonso Pineda, Joseph Wargacki, Stanislaw Krycinski, and Stanley Karwaczka, Respondent violated Section 8(a)(3) and (1) of the Act.

2. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Since all the discriminatorily discharged employees except one have been reinstated and there is no evidence or contention that they have not been properly reinstated, I shall order the reinstatement only of employee Stanley Karwaczka to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights. Karwaczka and the seven other discriminatorily discharged employees shall be made whole for any and all losses of earnings caused by their unlawful discharges. The amounts due to these employees shall be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).[23]

Upon the foregoing findings of fact and conclusions of law, I hereby issue the following recommended:

ORDER[24]

The Respondent, AMPAC, a subsidiary of Kane-Miller Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they participate in a strike or engage in other protected concerted or union activity.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Stanley Karwaczka full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights, and make him and employees Frank Sekula, Jesus Gonzales, Juan Perez,

[23] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[24] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Warren Mills, Alfonso Pineda, Joseph Wargacki, and Stanislaw Krycinski whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharge in the manner set forth in the "Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for its examination and copying, all payroll and other records necessary or useful in order to analyze and determine the amount of backpay due under this Order.

(c) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations not found herein.

[25] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."